11-19-2013

State v. Estep Appellant's Brief Dckt. 40646

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. TIMOTHY EUGENE ESTEP , Defendant-Appellant.	)	NO. 40646 KOOTENAI COUNTY NO. CR 2010-15488 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN T. MITCHELL
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

SPENCER J. HAHN
Deputy State Appellate Public Defender
I.S.B. #8576
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Timothy Eugene Estep appeals from the judgment of conviction for rape and dispensing alcohol to a minor entered following a jury trial. On appeal, he asserts that the district court erred when it denied him his right to self-representation under the Sixth Amendment to the United States Constitution, Article I, § 13 of the Idaho Constitution, and Idaho Code §§ 19-106 and 19-857. He further asserts that the district court abused its discretion when it imposed a fixed life sentence following his conviction for non-forcible rape.

Statement of the Facts and Course of Proceedings

Timothy Eugene Estep was charged, by Amended Information, with rape and dispensing alcohol to a minor. (R., pp.348-49.) The matter proceeded to a jury trial following which Mr. Estep was found guilty as to both counts. (Tr., p.343, Ls.3-21.) For the seventeen months preceding his trial, Mr. Estep made numerous unsuccessful attempts to discharge defense counsel and represent himself. (*See* 6/9/11 Tr., p.23, L.13 – p.28, L.10; R., pp.167, 174; 8/4/11 Tr., p.44, L.21 – p.45, L.21; R., p.176; 11/18/11 Tr., p.55, Ls.17-19; R., p.220; 4/3/12 Tr., p.112, Ls.2-16; R., pp.260-61; Tr.,[1] p.11, L.6 – p.12, L.6; R., p.404.)

At the sentencing hearing, the State requested imposition of a life sentence for rape, with twenty-five years fixed. (Tr., p.432, Ls.12-17.) Defense counsel requested no specific underlying sentence, but did ask the district court to retain jurisdiction.

[1] All references to "Tr." are to the transcript of the jury trial and sentencing prepared on February 11, 2013. Citations to other hearings contained in supplemental transcripts are by date.

(Tr., p.437, Ls.10-12.) Ultimately, the district court, exceeding the State's recommendation, imposed a fixed life sentence for rape. (Tr., p.463, Ls.2-9.)

Mr. Estep filed a timely Notice of Appeal. (R., p.439.)

ISSUES

1. Did the district court violate Mr. Estep's rights under the Sixth Amendment to the United States Constitution, Article I, § 13 of the Idaho Constitution, and Idaho Code §§ 19-106 and 19-857, when it refused to permit him to represent himself at trial?

2. Did the district court abuse its discretion when it imposed a fixed life sentence following Mr. Estep's conviction for non-forcible rape?

ARGUMENT

I.

The District Court Violated Mr. Estep's Rights Under The Sixth Amendment To The United States Constitution, Article I, § 13 Of The Idaho Constitution, And Idaho Code §§ 19-106 And 19-857 When It Refused To Permit Him To Represent Himself At Trial

A. Introduction

Proceedings Before Judge Simpson[2]

Mr. Estep first attempted to exercise his constitutional and statutory right to self-representation at a hearing held on June 9, 2011. Upon being informed of his request, the district court conducted a lengthy colloquy, covering a number of topics. The district court first inquired as to Mr. Estep's educational background, to which Mr. Estep responded,

> Well, I have a bachelor's degree and was working on my master's degree. And I have a little bit of brain damage, but I am overcoming it. I can read perfectly well. I can write. I can communicate well. I have some issues, but I think with the right amount of preparation and possibly some help from – I think I could do this.

(6/9/11 Tr., p.24, Ls.4-14.)

When the district court asked whether he was "prepared at this point," Mr. Estep replied, "I am prepared as I can be without any witnesses or evidence, which I don't have anyway, so I think I am okay." (6/9/11 Tr., p.24, Ls.18-22.) When asked whether he "want[s] to have witnesses," Mr. Estep answered, "It would be nice to have some witnesses in my evidence." (6/9/11 Tr., p.24, Ls.23-25.) When the district court inquired as to why he was insistent on going to trial as it was then scheduled despite not

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[2] Mr. Estep's attempts to exercise his constitutional and statutory right to self-representation were made before two different district court judges. As such, the facts surrounding each request will be set forth separately.

having any witnesses on his behalf, Mr. Estep explained, "If I go with the current counsel, they have done nothing. So, I don't feel like I would be any worse represented by myself next Tuesday," noting that he'd already "been in custody for a year," he said, "I prefer not to wait." (6/9/11 Tr., p.25, Ls.1-11.)

When he was asked when the "last time you picked a jury" was, he replied, "Well this will be a new – I will be a novice at that. There is no doubt about it. It is a jury of my peers." (6/9/11 Tr., p.25, Ls.12-16.) Joking about the idea of having a jury of his peers, he noted, "I assume they are all going to be 60-year-old men from Oklahoma."[3] (6/9/11 Tr., p.25, Ls.16-17.) Mr. Estep then astutely observed, "All I can do is my best. If I fail at the – they say only a fool represents himself, and I know this. But I feel at this point if I fail, at least I went down – I can't blame anyone but me."[4] (6/9/11 Tr., p.25, Ls.21-24.)

The district court then inquired into Mr. Estep's psychological state. Mr. Estep acknowledged having been hospitalized for approximately six weeks after being found unable to aid and assist in this case. He explained, "And they evaluated me to be quite sane, I think. I think that came out exemplary." (6/9/11 Tr., p.25, L.25 – p.26, L.6.) He also reported having once been sent to a hospital following a suicide attempt, but "[e]ven then the doctors didn't put me on any medication or anything [because] [t]hey felt like it was a situational depression." (6/9/11 Tr., p.26, Ls.17-24.)

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[3] Mr. Estep was born in Oklahoma and is in his mid-fifties. (PSI (contained in Sealed Attachments file), p.467.)

[4] This statement is remarkably close to what Justice Potter, writing for the majority in *Faretta*, explained when discussing why the "right to defend,": guaranteed by the Sixth Amendment, "is given directly to the accused." Justice Potter explained that it is the accused's right to control his defense because "it is he who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 819-20. Justice Potter went on to note, "To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment." *Id.* at 820.

When asked about the elements of the rape charge, Mr. Estep explained, "I would hope they would have some DNA evidence . . . and I'm going to assume they have eyewitnesses, and I'm going to assume they did a rape kit to verify all this." (6/9/11 Tr., p.26, L.25 – p.27, L.10.) When asked about "typical defenses," Mr. Estep replied,

> Well, typical defenses would have had an investigator, they would have had eyewitnesses there, they would have talked to people about the circumstances, they would have had DNA testing done. Oh, they probably would have cross-examined the witnesses's [sic] friends and checked out the witnesses' background and basic things. But these weren't done anyway. So I may not be able to do those, but all I can do is present the case the best I can, sir. I may not have all of the tools available to me, but what I do have I will use them the best I can.

(6/11/09 Tr., p.27, L.17 – p.28, L.4.)

The district court's final question was whether Mr. Estep "realize[d] if you represent yourself and you lose you are potentially looking at a life sentence?" Mr. Estep responded, "Yes, sir." At that point, the district court announced, "The Court finds that you are not properly qualified to represent yourself." (6/9/11 Tr., p.28, Ls.5-10.) The district court did not provide any reasoning or basis for depriving Mr. Estep of his right to self-representation.

In July 2011, Mr. Estep filed a kite in which he explained, "I need to file a motion for 'pro-se' under state provisions as set per guidelines with ex-parte and re-movial [sic] of current countsull [sic]." (R., p.167.) In August 2011, Mr. Estep filed another kite in which he "plead[ed] [with] the court for removal of current attorney to [go] 'pro-se.'" (R., p.174.)

At a hearing on August 4, 2011, Judge Simpson noted that he'd received "a third request to represent yourself" from Mr. Estep. In addressing the renewed requests for self-representation, the district court merely stated, "The first time you asked me to

represent yourself I told you no, I don't find you to be competent to do so, after we discussed the issue. You need the assistance of counsel." (8/4/11 Tr., p.44, Ls.19-24.) Several days later, Mr. Estep again filed a kite in which he requested that he be allowed to represent himself. (R., p.176.)

At a hearing on November 18, 2011, conflict counsel advised the district court that he had received the competency evaluation for Mr. Estep, which concluded "that he is competent to proceed as a defendant . . . But it finds he is not competent to proceed on his own."[5] (11/18/11 Tr., p.55, Ls.10-16.) In response, the district court announced, "Well, I already found that he is not competent to proceed as his own attorney in the case. *I have no intention of letting him represent himself.*" (11/18/11 Tr., p.55, Ls.17-19 (emphasis added).)

In a letter dated February 6, 2012, filed with the district court on February 9, 2012, the Idaho Department of Health and Welfare evaluator wrote, "The assessment that I completed on Timothy Estep concluded that he does not have a mental illness. His behaviors are due to a severe Personality Disorder and are under his volitional

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[5] The portion of the report in which the psychologist addresses the issue of self-representation, written based on interviews and tests conducted in July 2011, reads as follows:

> It is the opinion of this examiner that Mr. Estep does not have the capacity to adequately represent himself as his own attorney. During the current examination he gave inconsistent answers, had difficulty giving clear and consistent responses to similar types of questions, and while he likely has better ability than he currently presents with, that ability is actually at an unknown level. Therefore in his own best interest, he would appear to need the benefit of external council [sic].
>
> This evaluation, it should be noted was quite complicated and somewhat tentative in nature . . . .

(Psychological Evaluation, dated July 15 & 28, 2011 (contained in Sealed Attachments file) (*hereinafter* Psychological Evaluation (July 2011)), p.341.)

control." (Letter from Linda C. Hill, MS, LCPC (contained in Sealed Attachments file), p.342.) A redacted copy of the psychological report referenced by defense counsel at the September 2011 hearing was filed with the district court on February 3, 2012. (Psychological Evaluation (July 2011), p.330.)

In a psychological evaluation to determine Mr. Estep's fitness to proceed to trial, conducted in November 2010 and filed with the district court on November 26, 2010, the psychologist concluded that, although Mr. Estep "may have mild cognitive impairments, they do not significantly affect his fitness to proceed. It is highly likely that he is malingering his memory deficits as a way to avoid the legal process." (Psychological Report, dated November 16, 2010 (contained in Sealed Attachments file) (*hereinafter,* Psychological Report (November 2010)), pp.20, 24.) That evaluation also included a discussion of results from the Test of Memory Malingering, which results were "far below what would be expected of individuals with genuine neurological impairment." (Psychological Report (November 2010), p.23.) The November 2010 report's conclusion is consistent with the July 2011 psychological evaluation in which the psychologist noted,

> *It is suspected that he does have a cognitive impairment to some extent, although the actual extent is unknown.* Taken at face value, the scores obtained during this evaluation are quite low and not consistent with the level of independence, planning, organization, and facility in being [in] the community reported by others such as his guardian. The scores and presentation would be more consistent with an individual needing residential care rather than managing the independence he appears to have been capable of. Additionally, while his memory was such that he could not recall personal information, he was able to provide sufficient contact information for the examiner to locate an attorney he had worked with 10 years earlier, and with his guardian who lives in Washington State. Mr. Estep at the conclusion of the second session indicated that his public defender (Ann Taylor) "has a big surprise coming" and when asked to elaborate indicated that he had initiated a suit against her that he did not wish to discuss. Although the examiner was unaware of this at that time, his statement did in fact prove to be true, necessitating a change in

> attorneys and delay in completing this evaluation. *It is therefore suspected that Mr. Estep is capable of better memory and planning than his presentation and test scores would suggest.*

(Psychological Evaluation (July 2011), p.339 (emphases added).)

On February 27, 2012, the district court issued an Order in which it found "that the defendant, after evaluation ordered by This Court pursuant to Idaho Code 18-211, is found to be competent and fit to proceed to trial and to assist in his own defense." (R., p.209.) It contained no mention of Mr. Estep's competence to act as his own attorney. (R., p.209.) On March 29, 2012, Mr. Estep filed a kite with the district court again expressing his desire to represent himself. (R., p.220.)

At a hearing on April 3, 2012, the district court considered and denied Mr. Estep's renewed request to represent himself, explaining,

> Mr. Estep, with respect to your motion to represent yourself, we have already done that twice. I have already told you no twice. I am telling you no again. You have an attorney. You are going to continue to have an attorney unless you get to a much better condition where I think you can communicate and represent yourself. So your motion for pro se representation is denied.
>
> . . .
>
> Mr. Estep, from here on out if you send me a kite from the jail, I'm not going to look at it. Communicate through your attorney. It's an ex parte contact; that is inappropriate. You have counsel. Communicate through counsel.

(4/3/12 Tr., p.112, Ls.2-16.)

Proceedings Before Judge Mitchell

Approximately one month before trial, Judge Simpson voluntarily disqualified himself. (R., p.258) After Judge Simpson disqualified himself and Judge Mitchell was assigned, defense counsel filed a Motion for Leave to Withdraw or to Allow Defendant to Proceed Pro Se with Stand-By Counsel. In the Motion, defense counsel explained

that the request was based, in part, on the fact that "Defendant has clearly demanded his right to represent himself." (R., pp.260-61.) Following a hearing, at which Mr. Estep was not asked any questions prior to the district court's ruling but at which defense counsel represented, "Well, Your Honor, Mr. Estep has exercised his right to proceed pro se. He's informed me this morning that he does not want to proceed pro se; instead, he just wants a different attorney," the district court denied the Motion in all respects. (Tr., p.11, L.6 – p.12, L.6.)

Regardless of whether Mr. Estep's attorney could have waived the issue of self-representation at the hearing on defense counsel's motion, three days before trial started, Mr. Estep filed a kite with the district court in which he again sought to exercise his right to self-representation, specifically seeking "to bring a motion to pro-se if not total then for cross examination of any prosecution withiness [sic]." (R., p.404 (underlining in original).)[6] The district court made no attempt to address this request with Mr. Estep (See *generally* R. and Tr.), although it forwarded copies to defense counsel and the prosecuting attorney the day before trial. (R., p.404.)

Mr. Estep asserts that his right to self-representation, under the Sixth Amendment to the United States Constitution, Article I, § 13 of the Idaho Constitution, and Idaho Code §§ 19-106 and 19-857, was violated when the district court first denied

[6] Mr. Estep also continued to file kites in which he expressed a desire to proceed *pro se* (R., pp.294 (requesting that the court "file a motion ex-part [sic] pro-se to have defendant's witness list amended"), 295 (asking "the court to file pro-sae [sic] ex-part [sic]" to test DNA evidence through an independent lab), and other kites in which he sought rulings and relief while acknowledging that he was still represented by counsel. (R., pp.283 ("plead[ing] [with] the courts [sic] to file a motion to review the Order of Ex-parte by [defense counsel]," explaining that what he sought was "vidule [sic] to my defince [sic") and 288 ("plea[ding] [with] the court to file a motion to provide defendant witness list for trial," and that "without this motion a grave judical [sic] oversight my [sic] happen").)

and then ignored his requests to proceed *pro se*. Because the error was objected-to and structural, the violation of his right to self-representation requires that his convictions be set aside, with this matter remanded for a new trial at which his right to self-representation is honored.

B. The District Court Violated Mr. Estep's Rights Under The Sixth Amendment To The United States Constitution, Article I, § 13 Of The Idaho Constitution, And Idaho Code §§ 19-106 And 19-857 When It Refused To Permit Him To Represent Himself At Trial

1. Sixth Amendment Violation

The Sixth Amendment to the United States Constitution, in relevant part, provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]." U.S. CONST. AMEND. VI. The Sixth Amendment includes a right to self-representation when a person has knowingly, intelligently, and voluntarily waived his right to be represented by counsel. *Faretta v. California*, 422 U.S. 806 (1975). Such a waiver is considered knowing, intelligent, and voluntary if the person is "made aware of the dangers and disadvantages of self-representation." *Id.* at 835. Denial of the Sixth Amendment right to self-representation is "structural error," requiring "automatic reversal." *Neder v. United States*, 527 U.S. 1, 8 (1999) (citing *McKaskle v. Wiggins*, 465 U.S. 168 (1984)).

In *Indiana v. Edwards*, 554 U.S. 164 (2008), the United States Supreme Court explained that limitations can be placed on a defendant's Sixth Amendment right to self-representation when that person is too mentally incompetent to act as his own counsel but still mentally competent enough to aid and assist in his own defense. *Edwards*, 554 U.S. at 174-79.

Edwards provides no guidance, let alone a standard, as to when it is appropriate or constitutional to deprive a criminal defendant of his Sixth Amendment right to represent himself. As Justice Scalia noted in his dissent,

> Today's holding is extraordinarily vague. The Court does not accept Indiana's position that self-representation can be denied "'where the defendant cannot communicate coherently with the court or a jury,'" *ante*, at 2388. It does not even hold that Edwards was properly denied his right to represent himself. It holds only that lack of mental competence can under some circumstances form a basis for denying the right to proceed *pro se*, *ante*, at 2381-2382. We will presumably give some meaning to this holding in the future, but the indeterminacy makes a bad holding worse.

Edwards, 554 U.S. at 189. Justice Scalia went on to warn of the slippery slope created by the Supreme Court's vague and standard-free opinion, explaining, "Once the right of self-representation of the mentally ill is a sometime thing, trial judges will have every incentive to make their lives easier – to avoid the painful necessity of deciphering occasional pleadings of the sort contained in the Appendix to today's opinion – by appointing knowledgeable and literate counsel." *Id.*

The Idaho Court of Appeals, applying *Edwards*, has explained that competency requires not just a capacity to understand proceedings, but to have a rational understanding, and whether it is appropriate, under the Sixth Amendment, to grant a defendant's request for self-representation involves a determination of whether the defendant is "rational enough to represent himself rather than be represented by counsel." *State v. Hawkins*, 148 Idaho 774, 779 (Ct. App. 2009). In *United States v. Ferguson*, 560 F.3d 1060 (9th cir. 2009), the Ninth Circuit explained that some "indications" that the *Edwards* exception to the right to self-representation "does not apply" include consideration of whether the defendant "was either malingering or

intentionally obstructing the proceedings to inject error" and the absence of "a 'severe mental illness.'" *Ferguson*, 560 F.3d at 1068.

In Mr. Estep's case, Judge Simpson made no substantive factual findings regarding his inability to represent himself. He merely concluded, without reference to anything specific, that Mr. Estep was either not qualified or not competent to represent himself. (6/9/11 Tr., p.28, Ls.9-10 ("The Court finds that you are not properly qualified to represent yourself."); 8/4/11 Tr., p.44, Ls.21-23 ("The first time you asked to represent yourself I told you no, I don't find you competent to do so, after we discussed the issue. You need the assistance of counsel."); 11/18/11 Tr., p.55, Ls.17-19 ("Well, I already found that he is not competent to proceed as his own attorney in the case. I have no intention of letting him represent himself."); 4/3/12 Tr., p.112, Ls.2-9 ("Mr. Estep, with respect to your motion to represent yourself, we have already done that twice [sic]. I have already told you no twice [sic]. I am telling you no again. You have an attorney. You are going to continue to have an attorney unless you get to a much better condition where I think you can communicate and represent yourself. So your motion for pro se representation is denied.").) Judge Simpson also provided no explanation or standard as to how Mr. Estep could demonstrate competence for self-representation to his satisfaction.

Nothing contained in the record indicates that Mr. Estep is incapable of coherently and rationally communicating in legal proceedings. In fact, the record shows exactly the opposite. At the hearing on Mr. Estep's first motion to represent himself, the Judge Simpson asked Mr. Estep a series of questions, to which he provided rational, clear answers, including even inserting a fairly sophisticated humorous observation

regarding a jury of his peers and an observation concerning self-representation that mirrored one made by Justice Potter in *Faretta*. (6/9/11 Tr., p.24, L.4 – p.28, L.8.)

Despite this first denial, Mr. Estep continued to pursue his right to self-representation, filing a renewed request to exercise his right. (R., p.167.) One week later, meticulously following the instructions on the kite form that each form contain "only one request," Mr. Estep filed two separate kites concerning trial preparation issues. In the first, he requested that the district court issue an order allowing him to have non-jail clothing for trial, which he noted was two weeks away, and in the second, he requested a court order that he be provided a haircut and that his beard be trimmed so he could shave it before trial.[7] (R., pp.172-73 (capitalization changed).) These actions are not those of a person incapable of effective communication and not rational enough to represent himself.

Judge Mitchell's failure to address Mr. Estep's final request to proceed *pro se* was erroneous, as "a motion to proceed pro se is timely if made before the jury is empaneled, unless it is shown to be a tactic to secure delay." *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982) (citation omitted). As the Ninth Circuit explained, a criminal defendant "must (however) have a last clear chance to assert his constitutional right . . . before meaningful trial proceedings have commenced." *Id.* (quoting *United States v. Chapman*, 553 F.2d 886, 895 (5th Cir. 1977)) (parentheses and ellipsis in original). The Idaho Supreme Court has repeatedly held that due process requires that a person have the opportunity to be heard before he is deprived of one of his rights.

[7] Mr. Estep astutely explained the reason he requested a beard trim before he could shave it, noting that his beard was "to [sic] Long To cut with Jail Razors." (R., p.173.) This is hardly the work of a person who cannot communicate coherently or make rational decisions.

See Mays v. District Court, 34 Idaho 200, __, 20 P. 115, 116 (1921) ("Due process of law requires that one be heard before his rights are adjudged.") (citation omitted); *Gilbert v. Elder*, 65 Idaho 383, __, 144 P.2d 194, 196 (1943) ("[D]ue process of law has been variously held to mean a law which hears before it condemns, which proceeds on inquiry, and renders judgment only after trial.") (citation and internal quotation marks omitted); *Rudd v. Rudd*, 105 Idaho 112, 115 (1983) ("The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved in the judicial process be given meaningful notice and *a meaningful opportunity to be heard.*") (emphasis added) (citations omitted).

No finding was made that Mr. Estep's last clear attempt to exercise his right to represent himself was made for the purpose of delay, as the district court made no decision on the request, instead merely forwarding it to defense counsel and the prosecuting attorney. All indications in the record are that Mr. Estep did not intend to use his request to represent himself as a delay tactic; most notable is the fact that, at the hearing on his first motion to represent himself, Mr. Estep made it clear that he did not want his request to alter the then-existing trial date. (6/4/11 Tr., p.28, L.9 – p.29, L.5.) Mr. Estep was not given the meaningful opportunity to be heard required under both the United States and Idaho Constitutions before his Sixth Amendment right to self-representation was impliedly denied for the final time.

Regarding Judge Simpson's decisions concerning Mr. Estep's competency, even assuming they were somehow based on implied findings of fact, Mr. Estep maintains that the facts do not support such a conclusion, and show instead, that under the Sixth Amendment, Mr. Estep was competent to represent himself. In addition to the observations and conclusions of the various psychological professionals discussed in

the Introduction and argument, *supra*, a number of other facts contained in the record support a finding of competence to proceed *pro se* under the Sixth Amendment.

First, on the morning of the first day of trial, Judge Mitchell allowed Mr. Estep to make a purportedly knowing, intelligent, and voluntary waiver of his right to be present at trial (and appeal any claim of error in allowing him to do so). After asking Mr. Estep "a couple questions regarding competency," and receiving apparently satisfactory answers, the district court declared, "All right. You've convinced me that you're competent to make that decision . . . ." (Tr., p.38, L.10 – p.40, L.5.) The decision as to whether to waive one's appearance before a jury on a serious felony, carrying a potential life sentence, involves the kind of decision more akin to self-representation than it does to a guilty plea. It requires a rational weighing of the impact such a decision will have on the outcome of the trial, most notably how it will be perceived by the jury. If he was competent to make that type of strategic decision, then it is difficult to say he couldn't have made similar decisions while acting as his own attorney.

Second, following the jury's verdict, denying defense counsel's request that sentencing occur at some time more distant than when it was scheduled (eight days after the verdict), the district court explained,

> Well, that's when I'm going to have sentencing. This event, which is no longer alleged, occurred two years and three months ago. If there is evidence in mitigation, I would've expected that to be available to Mr. Estep at all times during that last two years and three months. *Mr. Estep seems quite competent* and able to aid and assist his counsel and can certainly give any mitigating evidence that exists on this planet to [defense counsel] essentially instantly.

(Tr., p.349, L.19 – p.350, L.2 (emphasis added).)

Next, just prior to sentencing, when denying a motion to continue sentencing to allow Mr. Estep to secure witnesses to rebut information contained in the PSI, the district court explained,

> Additionally, *the Court has, even though the Court hasn't been the assigned judge for very long, has seen the manipulation that Mr. Estep has visited upon the judicial system*, and he's perpetuating that at least at the time of the trial, he was refusing to eat again, and I'm not willing to allow your client to put himself into a condition where he's not competent to be sentenced.

(Tr., p.387, Ls.11-17 (emphasis added).)

Further undercutting any argument that Mr. Estep was somehow incapable of acting as his own attorney is the district court's post-trial description of Mr. Estep's legal abilities, namely, "*You've played the justice system better than anybody I've ever seen. You're a master*, and it's because of that there is no way – even if you're not a serial rapist you're a sociopath that can't be treated in our community. (Tr., p.462, Ls.7-13 (emphasis added).)

For the reasons set forth *supra*, Mr. Estep asserts that the district court violated his Sixth Amendment right to self-representation when it denied his repeated attempts to exercise the right and when it ignored his final, timely attempt to exercise the right. Because the error is structural, the only remedy available for such a violation is remand for a new trial.

2. Article I, § 13 And Idaho Code §§ 19-106 And 19-857 Violations

Article I, § 13, of the Idaho Constitution, in relevant part provides, "In all criminal prosecutions, the party accused shall have the right . . . to appear and defend in person and with counsel." ID. CONST. ART. I, SEC. 13. In *State v. Lankford*, 116 Idaho 860 (1989), the Idaho Supreme Court, interpreting both the Sixth Amendment and Article

I, § 13, held, "Ultimately, the decision of whether to exercise the right to counsel or proceed *pro se* is for the defendant's to make. The role of the trial court is simply to ensure that where the defendant waives the right to counsel he or she does so knowingly and intelligently." *Lankford*, 116 Idaho at 865. The opinion did not differentiate between the similar provisions in both the federal and Idaho constitutions.

The fact that the United States Supreme Court has, since *Lankford*, diminished the Sixth Amendment right to self-representation, does not mean that the Idaho Supreme Court should do likewise with respect to the similar right provided for in Article I, § 13 of the Idaho Constitution. As the Idaho Supreme Court has explained,

> We do not suggest, however, that if federal courts were to change these rules we would likewise change ours, unless, of course, our rules were now held to violate the federal constitution. The reason is that federal and state constitutions derive their power from independent sources. It is thus readily apparent that state courts are at liberty to find within the provisions of their own constitutions greater protection than is afforded under the federal constitution as interpreted by the United States Supreme Court. This is true even when the constitutional provisions implicated contain similar phraseology. Long gone are the days when state courts will blindly apply United States Supreme Court interpretation and methodology when in the process of interpreting their own constitutions.

State v. Newman, 108 Idaho 5, 10 n.6 (1985) (citation to *Oregon v. Hass*, 420 U.S. 714, 719 (1975) omitted).

In addition to the Idaho Constitution's guarantee of the right to self-representation, two Idaho statutes confer such a right, in a manner that suggests a more robust right than is guaranteed under the Sixth Amendment. Idaho Code § 19-857 provides:

> A person who has been appropriately informed of his right to counsel may waive any right provided by this act, if the court concerned, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. *The court shall consider such factors as the person's*

> *age, education and familiarity with the English language and the complexity of the crime involved.*

I.C. § 19-857 (emphasis added). Additionally, Idaho Code § 19-106, in relevant part, provides, "In a criminal action the defendant is entitled . . . [t]o be allowed counsel as in civil actions, or to appear and defend in person and with counsel." I.C.§ 19-106. The Idaho Supreme Court, in *State v. Athens*, 36 Idaho 224 (1922), has interpreted this statute[8] as providing a defendant with "the right to appear for himself" *without* counsel. *State v. Athens*, 36 Idaho at __, 210 P. 133, 134 (1922) ("The same statute that gave him the right to counsel gave him the right to appear for himself.").

Assuming that this Court finds no Sixth Amendment violation of Mr. Estep's right to self-representation, he asserts that, relying on Article I, § 13, Idaho Code §§ 19-106 and 19-857, and the Idaho Supreme Court's interpretation of Idaho Code § 19-106 in *Athens*, his right to self-representation under Idaho law was violated when the district court repeatedly denied his requests to represent himself at trial. Because the error was both objected-to and structural, his convictions must be vacated with this matter remanded for a new trial at which he is afforded his Idaho constitutional and statutory right to self-representation. *See State v. Perry*, 150 Idaho 209, 227-28 (2010) (announcing Idaho appellate rule in which, *inter alia*, "[w]here the [objected-to] error in question is a constitutional violation found to constitute a structural defect, affecting the base structure of the trial to the point that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, the appellate court shall automatically vacate and remand").

[8] *Athens* predates the statute's renumbering to I.C. § 19-106.

II.

The District Court Abused Its Discretion When It Imposed A Fixed Life Sentence Following Mr. Estep's Conviction For Non-Forcible Rape

A. Introduction

Assuming that this Court does not grant the relief requested in Part I, *supra*, Mr. Estep asserts that, in light of his brain injury and the nature of his offense, the district court abused its discretion when it imposed a fixed life sentence following his conviction for non-forcible rape.[9]

B. The District Court Abused Its Discretion When It Imposed A Fixed Life Sentence Following Mr. Estep's Conviction For Non-Forcible Rape

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982). The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Estep does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Estep must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and

[9] Any claim concerning the sentence imposed for dispensing alcohol to a minor is moot, as that sentence has been served.

the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

Perhaps the most important factor demonstrating the unreasonableness of the fixed life sentence imposed on Mr. Estep for non-forcible rape is the nature of the offense. Unlike fixed life rape sentences that have been upheld as reasonable, the rape in this case was non-forcible. *See State v. Brown*, 121 Idaho 385, 394 (1992) (upholding fixed life sentence for rape because "[t]he gravity of the offense in this case was very great. Brown not only rape the victim but almost killed her. Only remarkable medical procedures saved her life. While this is not a homicide case, it might well have been.").

Mr. Estep used no force or threat of force to commit the rape. He instead took advantage of the victim's voluntarily intoxicated state to engage in non-consensual sexual intercourse with her. When she became aware of what was happening, he did not use force to attempt to continue the assault, nor did he threaten her in any way; in fact, he immediately got out of the bed when she awoke. (Tr., p.122, L.6 – p.135, L.1.) Although after she left his home, he caught up to her in his car and attempted to persuade her to let him give her a ride home, he did not make any threats or use any force in attempting to get her to accept his offer. (Tr., p.135, L.2 – p.137, L.4.)

Additionally, unlike when the Idaho Supreme Court has upheld a fixed life sentence for similar conduct, namely lewd conduct, the offense in this case was not committed over a prolonged period of time and Mr. Estep is not someone with a history of violence. *See State v. Cross*, 132 Idaho 667, 671-72 (1999) (district court's fixed life sentence for lewd conduct was appropriate in light of prolonged nature of the offenses and the defendant's "potential for violence," including throwing a chair in his incident

upon being confronted by a victim and his assertion that he "'gets even" with those who wrong him). In *Cross*, the Idaho Supreme Court explained that it has long noted that, while "lewd and lascivious conduct with a minor less than sixteen is a serious crime, a fixed-life sentence is a serious penalty and should not be imposed lightly." *Id.* at 672 (citations omitted).

Reiterating its precedent, the Idaho Supreme Court explained, "'a fixed life sentence should not be regarded as a judicial hedge against uncertainty,'" explaining that "such a sentence requires a high degree of certainty that the perpetrator could never be safely released back into society or that the nature of the offense requires that the individual spend the rest of his life behind bars." *Id.* (citation omitted). Finally, the Idaho Supreme Court explained that it, and the Idaho Court of Appeals, "have upheld fixed life sentences [for lewd conduct] where the 'defendant's conduct was violent, repetitive, very cruel, or life threatening.'" *Id.* (citation omitted).

Mr. Estep's conduct was not "violent, repetitive, very cruel, or life threatening." His offense did not involve the use of force or threats of force, nor does the record indicate any reputation or history of violence. Further, the district court's fixed life sentence was most definitely a hedge against uncertainty, as the district court explained that it was rejecting the State's request for less than a fixed life sentence, reasoning,

> The final criteria [sic] is retribution or punishment. The punishment has to fit the crime. The punishment has to be proportionate to the crime committed. A fixed life sentence is the maximum that can be given, and I appreciate that. I feel that I am acting within the bounds of my discretion in imposing the maximum. I don't want S.L.G., your 2006 victim, to have any doubt that you will ever be out again in society. I certainly do not want C.C. to ever have any doubt in her mind that you will ever be out in society.
>
> With everything you've shown me, even if I were to have followed [the prosecutor's] suggestion of 25 years [fixed], you'd still be nearly 80, probably unable physically to do a lot, but I've seen paraplegics commit

> additional crimes. I've seen people that can barely shuffle commit and lure people in, commit crimes and lure people in, so there's just – there's no way I am willing to entertain anything other than a fixed life sentence.

(Tr., p.462, L.17 – p.463, L.9.)

Mr. Estep appears to have led a largely crime-free life prior to his brain injury in 2000,[10] after which time he was convicted of felony injury to a child (reduced from lewd conduct) and use of a telephone to harass (reduced from stalking in the second degree). (PSI, pp.469-71.)

In light of the nature of the offense and Mr. Estep's brain injury, he asserts that the district court abused its discretion when it imposed a fixed life sentence following his conviction for non-forcible rape.

CONCLUSION

For the reasons set forth herein, Mr. Estep respectfully requests that, due to the violation of his statutory and constitutional right to self-representation, this Court vacate his convictions and remand this matter for a new trial. In the alternative, if this Court concludes that his right was not violated, he respectfully requests that it reduce his sentence to a unified sentence of twenty years, with five years fixed.

DATED this 19th day of November, 2013.

SPENCER J. HAHN
Deputy State Appellate Public Defender

[10] Mr. Estep suffered some degree of brain damage as a result of hypoxia following a seizure. (Sealed Attachments file, pp.417-19.)

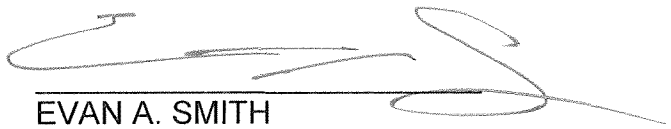
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of November, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

TIMOTHY EUGENE ESTEP
INMATE #88439
ISCI
PO BOX 14
BOISE ID 83707

JOHN T MITCHELL
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

SJH/eas